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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|----------------------------|------------------|
| 09/747,514 | 12/21/2000 | Paul V. Phibbs | 5218.87 | 1007 |
| 20792 | 7590 | 11/21/2003 | | |
| MYERS BIGEL SIBLEY & SAJOVEC PO BOX 37428 RALEIGH, NC 27627 | | | | |
| | | | EXAMINER GIBBS, TERRA C | |
| | | | ART UNIT 1635 | PAPER NUMBER |

DATE MAILED: 11/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/747,514

Applicant(s)

PHIBBS ET AL.

Examiner

Terra C. Gibbs

Art Unit

1635

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 November 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:


Claim(s) allowed: _____.

Claim(s) objected to: 5-7.Claim(s) rejected: 1-3, 8 and 9.

Claim(s) withdrawn from consideration: _____.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

Continuation of 5. does NOT place the application in condition for allowance because: Claims 1, 2, 3, 8, and 9 would remain rejected under 35 U.S.C. 103(a) as being obvious over Wolff et al. in view of O'Toole et al. and claims 1, 2, 3, 8, and 9 would remain rejected under 35 U.S.C. 102(a) as being anticipated by O'Toole et al. for the reasons of record set forth in the previous Office Action, filed November 9, 2003. In response to the previous Office Action, Applicants submitted a Declaration under 37 CFR 1.131. However, the Declaration under 37 CFR 1.131 is not sufficient to overcome the outstanding 102 and 103 rejections because the Declaration under 37 CFR 1.131 is not proper (see MPEP 715.04 (A)-(D) where it states, "The following may make an affidavit or declaration under 37 CFR 1.131: (A) All the inventors of the subject matter claimed. (B) An affidavit or declaration by less than all named inventors of an application is accepted where it is shown that less than all named inventors of an application invented the subject matter of the claim or claims under rejection. For example, one of two joint inventors is accepted where it is shown that one of the joint inventors is the sole inventor of the claim or claims under rejection. (C) A party qualified under 37 CFR 1.42, 1.43, or 1.47 in situation where some or all of the inventors are not available or not capable of joining in the filing of the application. (D) The assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor". Since the Applicant has stated on the first page of the Declaration under 37 CFR 1.131 #3, "The subject matter of the '514 application was invented by David N. Collier, Paul W. Hager, and myself", the proposed Declaration under 37 CFR 1.131 does not meet the conditions set forth in MPEP 715.04 (A)-(D) and is therefore insufficient to overcome the rejections of record.


ROBERT A. LACOURCIERE, PH.D
PRIMARY EXAMINER